

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 GRABLE & SONS METAL PRODUCTS, :

4 INC., :

5 Petitioner :

6 v. : No. 04-603

7 DARUE ENGINEERING & :

8 MANUFACTURING. :

9 - - - - -X

10 Washington, D.C.

11 Monday, April 18, 2005

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10:02 a.m.

15 APPEARANCES:

16 ERIC H. ZAGRANS, ESQ., Washington, D.C.; on behalf of the

17 Petitioner.

18 MICHAEL C. WALTON, ESQ., Grand Rapids, Michigan; on behalf

19 of the Respondent.

20 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor

21 General, Department of Justice, Washington, D.C.; on

22 behalf of the United States, as amicus curiae,

23 supporting the Respondent.

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ERIC H. ZAGRANS, ESQ.	
4	On behalf of the Petitioner	3
5	MICHAEL C. WALTON, ESQ.	
6	On behalf of the Respondent	23
7	IRVING L. GORNSTEIN, ESQ.	
8	On behalf of the United States,	
9	as amicus curiae, supporting the Respondent	29
10	REBUTTAL ARGUMENT OF	
11	ERIC H. ZAGRANS, ESQ.	
12	On behalf of the Petitioner	36
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 04-603, Grable & Sons Metal Products v. Darue
Engineering.

Mr. Zagrans.

ORAL ARGUMENT OF ERIC H. ZAGRANS
ON BEHALF OF THE PETITIONER

MR. ZAGRANS: Mr. Chief Justice, good morning,
and may it please the Court:

In Merrell Dow Pharmaceuticals, the Court
recognized an important limitation on the Court's prior
substantial Federal question cases. The Sixth Circuit
should have followed Merrell Dow rather than ignoring it
in deciding whether the presence of a Federal issue in
this Michigan quiet title action properly gave rise to
Federal question jurisdiction.

According to Merrell Dow, any State law claim
that alleges a violation of a Federal statute as an
element of the State law cause of action does not state a
claim arising under Federal law for section 1331 purposes
unless --

JUSTICE O'CONNOR: Do you take the view that
Merrell Dow somehow just silently overruled about five
cases dealing with quiet title actions?

1 MR. ZAGRANS: No, Justice O'Connor, we do not
2 take that position. We take Merrell Dow --

3 JUSTICE O'CONNOR: That seems to be your
4 position. I mean, I don't think Merrell Dow necessarily
5 had that effect.

6 MR. ZAGRANS: Agreed. We believe that Merrell
7 Dow's decision can be synthesized with the holdings in
8 those cases that Your Honor is referring to by reference
9 to the nature of the Federal interest that is at stake and
10 the role that Congress plays.

11 In the Smith v. Kansas City Title & Trust
12 Company line of cases and in Hopkins v. Walker, both of
13 those are different sorts of cases from Merrell Dow where
14 Congress provided the Federal right that was alleged to
15 have been violated, and the Court held that when Congress
16 provides a Federal statute that is -- is serving as an
17 element of a State law claim, then Congress must have
18 intended also to provide a Federal private right of action
19 in order for there to be arising-under jurisdiction.
20 That's the distinction.

21 JUSTICE SOUTER: Haven't we -- haven't we got
22 something equally different here? The -- the issue here,
23 as I understand it, is -- is not litigation of the State
24 law claim, but a claim under Federal law with respect to
25 the passage of title when property is taken for taxes. As

1 I understand the -- the original plaintiff's claim, it
2 simply is that if he's right, under Federal law he is
3 entitled to a declaration that the property is still his.
4 If he's wrong, the other side is entitled to property.
5 But the issue is a Federal issue, and the only way the
6 State has a role in it is that the State provides a
7 mechanism, the quiet title action, analogous maybe to
8 1983, for getting it into a State court. So it seems to
9 me that the issue is a Federal issue, not as in Merrell
10 Dow, a -- a State cause of action that incorporates by
11 reference a Federal standard.

12 MR. ZAGRANS: Justice Souter, I agree that it is
13 a Federal issue. I disagree, with respect, that it's
14 different from Merrell Dow because in both that case and
15 this quiet title action under Michigan law, the alleged
16 Federal issue is one element that needs to be alleged and
17 proved in order to make out the State law claim.

18 JUSTICE SOUTER: Yes, but I don't -- I guess
19 that's where we're parting company. I don't see that
20 there is a State law claim as distinct from a State law
21 procedure for trying that claim in a State court. As I --
22 as I said a second ago, it's sort of like 1983. It
23 doesn't create causes of action, but it provides a -- a
24 jurisdictional basis for getting into court if you've got
25 a cause of action. And in this case, it's a Federal

1 Solicitor General's was on. For purposes of deciding
2 whether or not Congress intended there to be Federal
3 question jurisdiction, I don't believe the focus should be
4 on the State's interest.

5 JUSTICE KENNEDY: Well, my --

6 MR. ZAGRANS: Yes, sir.

7 JUSTICE KENNEDY: Please, please. I didn't mean
8 to interrupt you. Did you finish your answer?

9 MR. ZAGRANS: No, but go ahead, Justice Kennedy,
10 please.

11 JUSTICE KENNEDY: No, please.

12 Well, my -- my initial view of this case was
13 much like Justice Souter's and -- and I still think that
14 that may be -- may be correct. But I thought your answer
15 to Justice Souter would be that there are many cases in
16 which there is an antecedent Federal title which then goes
17 down through successive purchasers, mining claims, for
18 instance, and those are always under State law. I -- I
19 thought that would be your answer to Justice Souter and --
20 and also to Justice Ginsburg.

21 MR. ZAGRANS: Justice Kennedy --

22 JUSTICE KENNEDY: And you rely on Merrell Dow,
23 which is fine. But I thought there was a separate line of
24 cases that support you, as well as Merrell Dow.

25 MR. ZAGRANS: There are, Your Honor, but I think

1 Trust and Merrell Dow is the nature of the Federal
2 interest at stake and the different ways they should be
3 applied. In Kansas City Title & Trust, the interest was
4 -- or the alleged violation was a Federal constitutional
5 violation.

6 JUSTICE GINSBURG: Yes, but the Court didn't
7 make it -- the Court's proposition in Kansas City Title &
8 Trust was if it appears from the complaint that the right
9 to relief depends on the construction or application of
10 the Constitution or laws of the United States. So are you
11 asking us to take out or laws as dictum, or what is your
12 position?

13 MR. ZAGRANS: I believe that the Court in
14 Merrell Dow made a limitation on that phrase that Your
15 Honor is quoting from, and the limitation is where
16 Congress controls the jurisdiction of the Federal courts,
17 such as with Federal statutory law, then the limitation of
18 Merrell Dow that Congress must also have intended to
19 create a Federal private right of action obtains. I
20 believe that's --

21 JUSTICE GINSBURG: Well, when does -- when does
22 the -- when do the words, or laws, in Kansas City Title &
23 Trust have operative effect?

24 MR. ZAGRANS: When -- when, as Merrell Dow says,
25 Congress intended there to be a Federal private right of

1 action for violation of the statute is alleged to be --

2 JUSTICE GINSBURG: You mean that the -- are you
3 saying then in the context of this case that the Federal
4 law would have to create a quiet title action, which is
5 traditionally State law?

6 MR. ZAGRANS: Yes, Your Honor, that's exactly
7 what we are arguing.

8 JUSTICE SCALIA: But doesn't Congress have to
9 create causes of action for constitutional violations as
10 well, or at least for most of them?

11 MR. ZAGRANS: Your Honor, Congress has not
12 created a jurisdictional statute for Federal
13 constitutional claims, which is why the Bivens doctrine
14 arose, unlike section 1983.

15 JUSTICE BREYER: Well, maybe this needs -- I
16 mean, if were to clarify --

17 JUSTICE SCALIA: Wait.

18 JUSTICE BREYER: Sorry.

19 JUSTICE SCALIA: I'm -- I'm not sure that I --
20 that I'm satisfied with the answer. You're -- you're
21 trying to give us one rule for constitutional claims and
22 another rule for statutory claims?

23 MR. ZAGRANS: I am, Your Honor.

24 JUSTICE SCALIA: On -- on what basis? I don't
25 understand it. Certainly in the text of the

1 jurisdictional statute, there's no such distinction. What
2 -- what is the basis for it?

3 MR. ZAGRANS: It derives from footnote 12 of
4 Merrell Dow where the Court was attempting to explain this
5 -- this difference that we are discussing. And in
6 footnote 12 of Merrell Dow, the Court says that the nature
7 of the jurisdictional answer will frequently depend upon
8 the different nature of the Federal interest that is at
9 stake. And it distinguished between Smith and -- and
10 Moore in that case, Smith being a Federal constitutional
11 question, Moore being a Federal statutory question.

12 JUSTICE SCALIA: And you think that that
13 explains all of these cases.

14 MR. ZAGRANS: Well, Your Honor, yes, I do
15 because of the nature of Congress' control over whether or
16 not there should be Federal private rights of action. It
17 is consistent with the Court's implied private right of
18 action jurisprudence from Alexander v. Sandoval, from the
19 Central National Bank of Denver case, et cetera.

20 JUSTICE KENNEDY: But you can't get anything out
21 of the words of the -- of the statute arising under to
22 help you.

23 MR. ZAGRANS: No, Justice Kennedy, I don't
24 believe you can because as many of the cases that this
25 Court has decided point out, those words are broad. They

1 are the exact same language that the constitutional grant
2 of Article III jurisdiction uses, and therefore, they have
3 to be given content in some other fashion.

4 JUSTICE KENNEDY: So just the strength of the
5 Federal interest is the --

6 MR. ZAGRANS: Clearly the --

7 JUSTICE KENNEDY: -- the controlling test?

8 MR. ZAGRANS: -- the strength of the Federal
9 interest is important, Justice Kennedy, but as Merrell Dow
10 pointed out, the Federal interest is not deemed to be
11 substantial enough, or the Federal question at stake in
12 the case is not deemed to be sufficiently substantial
13 unless Congress has created a Federal private right of
14 action for violation of the particular statute that is
15 being pled.

16 JUSTICE BREYER: That's what I -- I wanted to
17 follow up on this because I think it's a confusion that's
18 embedded in my mind in some of the cases, exactly what
19 Justice Scalia was asking you. And I'd like you to
20 comment on whether the confusion, as I see it, that's
21 involved here is the words -- arises out of the words,
22 private right of action. Private right of action is
23 where, A, one private person sues B, a non-Federal person,
24 under a Federal statute. And the reason that can lead to
25 confusion is because where you have a statute that governs

1 the relation between the Federal Government and a private
2 person, the words private right of action are out of place
3 normally, because an action between the two parties takes
4 place usually under the APA.

5 Now, that's what it seems to me is at work here
6 because the real question is not whether we have a private
7 right of action or APA review. The question is whether
8 Congress wanted to allow a private person to use this
9 particular Federal provision as the basis for judicial
10 review in a lawsuit. And if that's the right question,
11 the answer here is obviously it did.

12 It happens that we would have titled that
13 normally administrative procedural review under the APA.
14 But whether you call it private right of action or you
15 call it APA review is beside the point. In Merrell Dow,
16 Congress did not want actions to come into a court under
17 the statute there at issue. In this case, Congress
18 doesn't mind at all. In fact, it expects actions to come
19 into court under this statute.

20 I'd like you to comment on that thought.

21 MR. ZAGRANS: Justice Breyer, I disagree with
22 the premise of that thought. Congress in section 7433 did
23 provide what I would like to call a Federal private right
24 of action. It's an action by a private party against the
25 Government, not another private party, for damages in the

1 event the Government violates Federal law in the tax
2 collection process. What Congress did not do -- and the
3 Solicitor General concedes it did not do -- is create a
4 Federal private right of action for quiet title claims in
5 disputes between two private parties.

6 JUSTICE SCALIA: How did Congress -- surely
7 Congress did not expect any pronouncement of -- of title
8 by the Federal Government to be immune from challenge by
9 private individuals. If Congress did not anticipate that
10 a wrongful assertion of title through the Federal
11 Government could be challenged by a State action of this
12 sort to clear title, how did Congress expect it ever to be
13 challenged? I mean, I can't imagine how else you -- you
14 would attack somebody who -- who claims that he has
15 Federal title.

16 MR. ZAGRANS: You would bring, Your Honor, a
17 State quiet title action, as Grable did in Michigan court,
18 and allege, as the basis for the superiority of
19 plaintiff's title in that case, the violation of Federal
20 statute by the Federal agents. And therefore, the
21 purchaser at this Federal tax sale, Darue Engineering in
22 this case, does not have superior title.

23 JUSTICE SCALIA: Which is what -- is -- how does
24 that differ from what happened here?

25 MR. ZAGRANS: That's exactly what happened here.

1 What --

2 JUSTICE SCALIA: That's exactly what happened
3 here.

4 MR. ZAGRANS: What differs, Your Honor --

5 JUSTICE SCALIA: And -- and is that not
6 precisely what Congress expected? Did not Congress, in
7 fact, approve this manner of challenging the asserted
8 Federal title?

9 MR. ZAGRANS: I think without question, Your
10 Honor. What Congress, we are arguing, did not approve is
11 the removal of that State law quiet title action to
12 Federal court under arising-under jurisdiction merely
13 because of the presence of a Federal issue as an element
14 of the State law claim.

15 JUSTICE SCALIA: Well, I think you -- you have
16 to acknowledge there are at least three situations then:
17 number one, where Congress did not create a Federal cause
18 of action and did not expect that the States would create
19 a cause of action to vindicate or challenge the asserted
20 Federal interest; number two, where Congress did create a
21 -- a Federal cause of action; and number three, falling
22 between the two where Congress did not create a Federal
23 cause of action but, in the nature of things, must have
24 anticipated that there would be State causes of action
25 resting upon the Federal claim.

1 MR. ZAGRANS: Yes, I agree, Your Honor. And in
2 Merrell Dow, the Court held that in those middle cases --

3 JUSTICE SCALIA: Why was that a middle case?

4 MR. ZAGRANS: Why was that a middle case?
5 Because in Merrell Dow, the State of Ohio had product
6 liability tort law --

7 JUSTICE SCALIA: Congress would not have
8 necessarily anticipated that the States would glom onto a
9 Federal criterion for purposes of their State -- of their
10 State tort law --

11 MR. ZAGRANS: But --

12 JUSTICE SCALIA: -- whereas here, Congress must
13 have anticipated that quiet title actions of this sort
14 would be brought.

15 MR. ZAGRANS: Your Honor, when Congress enacted
16 the Federal Food, Drug and Cosmetic Act and did not
17 provide a Federal cause of action for it and yet laid out
18 Federal standards of conduct for labeling of drugs like
19 Bendectin in that case, Congress must have understood that
20 without it creating a Federal private right of action, the
21 States -- the State product liability law, State
22 inadequate warning law would subsume claims --

23 JUSTICE GINSBURG: But it wasn't necessary.

24 MR. ZAGRANS: -- for a violation of that Federal
25 standard.

1 JUSTICE GINSBURG: It was -- that's the
2 difference. The State in Merrell Dow chose to adopt those
3 Federal standards. It was a choice. I don't think a
4 State has the prerogative to ignore the effect of a
5 Federal tax sale. This is not a matter of State choice,
6 and that, it seems to me, is the large difference between
7 the two cases: one, where the State chooses to recognize
8 Federal standards when it doesn't have to, and here,
9 there's no question that the Federal law governs the
10 security of this title. It's not an option for the State
11 to ignore it.

12 MR. ZAGRANS: Justice Ginsburg, that's an
13 argument that appears in the Solicitor General's brief as
14 well, and I believe that the Solicitor General's focus on
15 a difference in State interests is misplaced when one is
16 dealing with Federal jurisdictional principles. Instead,
17 I think the focus should be on the expression of the
18 Federal interest, and the best expression of the Federal
19 interest at stake is congressional intent when one is
20 dealing with acts of Congress, Federal statutory law.

21 JUSTICE SCALIA: Right, except the -- except you
22 sort of abandon that for constitutional questions for some
23 inexplicable reason.

24 MR. ZAGRANS: Well, Justice Scalia --

25 JUSTICE SCALIA: No, no. It's an explicable

1 reason to distinguish other earlier cases.

2 MR. ZAGRANS: That's exactly right. That's
3 exactly right. To -- to try to -- to try to not have to
4 argue that, as Justice O'Connor's initial question to me
5 supposed, that all of that prior case law, prior to
6 Franchise Tax Board and Merrell Dow, somehow would go out
7 the window sub silentio. And that's not what we are
8 arguing.

9 JUSTICE GINSBURG: But you -- so you are -- you
10 are proposing one way to reconcile Kansas City. You say,
11 well, that's the constitutional claim. But why isn't it
12 at least as good a reconciliation to say once you go
13 through -- there's -- there's a Federal claim -- there's a
14 Federal question that's dispositive of this case, and you
15 agree that that's so here. The whole thing turns on the
16 meaning and effect of that notice provision. So the
17 Federal question is what determines this case, and you
18 satisfy the well-pleaded complaint standard.

19 Then at that point, when you satisfy the basic
20 Kansas City Title & Trust provisions, then to see which
21 way to swing, why isn't it appropriate to say is this a
22 case where the State has a large interest and the Federal
23 interest is not significant? Or, on the other hand, is it
24 a case where there is a large Federal interest in seeing
25 how this comes out?

1 MR. ZAGRANS: Because, Justice Ginsburg, I think
2 the focus is on the substantiality of the Federal question
3 and that's where the difference between the two situations
4 you are positing lies. With constitutional claims, they
5 are almost always substantial Federal questions. With
6 Federal statutory violations alleged as part of a State
7 law cause of action, Merrell Dow says they are not
8 substantial enough to confer arising-under jurisdiction
9 unless Congress intended to create a Federal private right
10 of action for the violation of that particular statute.
11 So --

12 JUSTICE GINSBURG: So you're saying that Merrell
13 Dow did take out those words, or laws, from the Kansas
14 City Title & Trust.

15 MR. ZAGRANS: Yes, Your Honor. I -- I suppose
16 that would be the effect of how it would have to be read

17 But it's not a question of one Federal interest
18 is less than another. Anytime Federal law is involved,
19 the Federal interest is great. The issue is for arising-
20 under purposes, for section 1331 purposes, whether the
21 Federal question is substantial or not sufficiently
22 substantial to confer arising-under jurisdiction. That's
23 the import in our argument and our submission, the holding
24 of Merrell Dow.

25 JUSTICE SOUTER: I take it you would agree that

1 we could leave the -- the Kansas City formulation, the
2 oral laws, intact and say that the distinguish -- that the
3 distinction between Merrell Dow and this case, which
4 leaves it intact is the distinction between in Merrell
5 Dow's case, the adoption by the State of a Federal
6 standard, though the State did not have to adopt it in its
7 tort law, purely optional, and in this case, the
8 application of Federal law which, under the Supremacy
9 Clause, the State had absolutely no choice but to apply.
10 If we recognize that distinction, we could leave the
11 language in Kansas City exactly where it is, couldn't we?

12 MR. ZAGRANS: No, Justice Souter, I don't think
13 you could because I think to do that would federalize a
14 great many State law causes of action that just happen to
15 have, as an element of them, a violation of some Federal
16 law that, due to the Supremacy Clause, the States would,
17 of course, be obliged to enforce.

18 JUSTICE SOUTER: What -- what are the -- sort of
19 the -- the horrors that you have in mind?

20 MR. ZAGRANS: An example would be anytime a tax
21 preparer makes a mistake of Federal income tax law in --
22 in preparing a return for a client and, as a result of
23 that, the client pays more tax than they otherwise should
24 have and they have a claim against the tax preparer either
25 for common law negligence or professional malpractice

1 under State law, but why did the -- the preparer commit
2 malpractice? Because of an interpretation of Federal tax
3 law.

4 JUSTICE SOUTER: Yes, but in -- in that case,
5 the action is not enforcing the Federal tax law, whereas
6 in this case, the action is, indeed, enforcing the passage
7 of title statute under the -- under the tax code.

8 MR. ZAGRANS: The tax code, section 6338(b)
9 specifically provides that title passes under State law,
10 not under Federal law. The only issue of Federal law
11 here --

12 JUSTICE SOUTER: But Federal law is
13 determinative.

14 MR. ZAGRANS: The only issue of Federal law here
15 that is determinative is whether or not the agents gave
16 proper notice of the seizure.

17 And interestingly, Justice Ginsburg made
18 reference to the well-pleaded complaint rule. There is a
19 secondary issue in this case, and that is that the
20 disputed issue of Federal law was not part of the well-
21 pleaded complaint. There is no dispute that the IRS
22 failed to give the statutorily required notice of personal
23 notice.

24 JUSTICE GINSBURG: Wasn't that in the -- in the
25 pleading?

1 MR. ZAGRANS: It was, indeed, Your Honor.

2 JUSTICE GINSBURG: Wasn't that in the complaint?

3 MR. ZAGRANS: In the complaint that they failed
4 to do it. That is undisputed. The -- the defendant
5 concedes it. The Government concedes it. What was
6 disputed was that there's a different statute --

7 JUSTICE GINSBURG: But the -- but the well-
8 pleaded complaint doesn't say it has to be a disputed
9 allegation. It says it must be. You couldn't state the
10 claim without having the Federal law in the complaint.

11 MR. ZAGRANS: Agreed, Your Honor. But some of
12 the cases suggest that the issue of Federal law, in order
13 to be deemed substantial, must be one that is in good
14 faith disputed. That is to say, undisputed issues of
15 Federal law are not substantial enough by themselves to
16 confer Federal question jurisdiction.

17 So I point out that the disputed Federal issue
18 from a different statute, 6339(b)(2), is in the nature of
19 a defense that Darue asserted. Notwithstanding the strict
20 -- the lack of strict compliance with the notice
21 provision, 6339(b)(2) allows substantial compliance.

22 JUSTICE KENNEDY: I know you want to reserve
23 your time. Just one quick thing. The Government makes
24 the distinction between an action to remove a cloud on
25 title and an action for possession. Do you agree that

1 Merrell Dow is, in fact, consistent with
2 Smith/Gully/Franchise Tax in establishing that test. And
3 the language which the Court utilized in Merrell Dow does
4 not, in any way, abandon those cases or indicate that the
5 logic is inappropriate. The Merrell Dow place in the
6 evaluation -- in the -- in the kaleidoscopic situations
7 which were described by Justice Cardoza is in a situation
8 where a Federal standard has been incorporated into the
9 State law cause of action. That's its place here. It
10 was, I believe, by this Court an attempt to -- to
11 illuminate what would occur in that circumstance, and it
12 is limited to that circumstance.

13 And the -- the question, which is set forth at
14 the beginning in Merrell Dow, about the incorporation --
15 and I'm -- I'm at page 805. The question presented is
16 whether the incorporation of a Federal standard in a State
17 law cause of action, when Congress intended there be no
18 Federal private action for violations of that Federal
19 standard, makes one arising under the Constitution, laws,
20 or treaties of the United States, all three.

21 JUSTICE KENNEDY: Suppose that the plaintiff
22 here alleged that the tax deed were forged, that the
23 occupant simply forged the tax deed and was occupied under
24 forgery. State cause of action there?

25 MR. WALTON: I believe that that would be a

1 State cause of action, yes.

2 JUSTICE KENNEDY: All right. Then suppose he
3 alleged not that it was forged, but that this -- that the
4 occupier of the land had -- had misconstrued the
5 occupier's rights to bid at the tax sale or -- or that
6 there -- the tax sale should never have been held. Then
7 that's a Federal --

8 MR. WALTON: Then I -- excuse me, Your Honor.
9 Then I believe that would be Federal, yes. That would
10 require resolution -- that would require construction of
11 the Federal statute.

12 JUSTICE GINSBURG: Suppose --

13 JUSTICE SCALIA: What if it doesn't require
14 construction, but -- but what if there is a factual
15 controversy? Suppose there is a factual controversy as to
16 whether notice was given and notice is required under the
17 Federal statute. Does -- does that factual controversy
18 with regard to an essential element of -- of Federal law
19 make it a Federal case?

20 MR. WALTON: If it's -- excuse me, Your Honor.
21 If it still presents a question of Federal law, yes.

22 JUSTICE SCALIA: Well, it doesn't present any
23 question of law, just a question of fact. Let's say both
24 parties agree about the law, but the fact that is
25 determinative of nothing, except the operation of Federal

1 law, is at issue. Now, that -- that would normally --
2 under 1331, you'd be able to come into Federal court I
3 suppose just where your only dispute is a factual dispute,
4 but it is a factual dispute regarding the operation of
5 Federal law. What -- what if this were just a factual
6 dispute about the operation of Federal law? What would we
7 do with it? Does the fact that it's a factual dispute
8 make it not substantial, not a substantial Federal
9 question?

10 MR. WALTON: I think that it could still be a
11 substantial Federal question because it could implicate a
12 substantial Federal interest.

13 JUSTICE SOUTER: Well, you're taking the -- I
14 mean --

15 JUSTICE KENNEDY: Well, and how is that
16 different from the forgery?

17 MR. WALTON: I'm sorry, Your Honor.

18 JUSTICE KENNEDY: How -- how is that different
19 from the forgery hypothetical?

20 MR. WALTON: It would -- it would then be the
21 same, Your Honor.

22 JUSTICE SOUTER: Well, you're taking the
23 position then, as I understand it -- and I -- I don't
24 disagree with your -- your position necessarily -- that
25 its construction or application --

1 MR. WALTON: Yes.

2 JUSTICE SOUTER: -- of Federal law.

3 MR. WALTON: Yes, Your Honor. That's correct.

4 JUSTICE SOUTER: Yes.

5 JUSTICE GINSBURG: Suppose the -- there was an
6 issue in this case about the plaintiff in the quiet title
7 action having waited too long. I think here it was 6
8 years after. So -- so suppose there was a defense of
9 laches under State law. That could be an issue in an
10 action in this format, quiet title action, which would be
11 governed by State law. Isn't that so?

12 MR. WALTON: It would, Your Honor.

13 JUSTICE GINSBURG: So that case wouldn't be
14 removable then if the -- if the defense is laches? The
15 plaintiff --

16 MR. WALTON: I believe -- excuse me, Your Honor.

17 JUSTICE GINSBURG: Yes?

18 MR. WALTON: I believe that it could be
19 removable because it could still involve the application
20 of the Federal law --

21 JUSTICE GINSBURG: But you might never get to
22 the Federal law if the determination of 6 years is too
23 long to wait to bring a suit like this. Then you would
24 remove and you could have an outcome based solely on State
25 law in the Federal court. You'd have a State claim. The

1 issue that divides the parties is how long was too long,
2 and the court decides the case on that basis and never
3 gets to the Federal question.

4 MR. WALTON: I see, Your Honor, yes.

5 JUSTICE GINSBURG: So if laches is pleaded as a
6 defense, then it's not removable? But don't you --
7 well --

8 MR. WALTON: Your Honor, I'm not certain.
9 That's -- I'm sorry. I'm not certain. I believe that it
10 could be removable, still utilizing the application of the
11 Federal law to that circumstance, even in the factual
12 dispute.

13 JUSTICE GINSBURG: Well, at what point do you
14 remove the case?

15 MR. WALTON: I'm sorry. I don't understand the
16 question, Your Honor.

17 JUSTICE GINSBURG: A complaint is filed in State
18 court, and you are the defendant and you want to remove
19 that case to Federal court.

20 MR. WALTON: Yes, Your Honor.

21 JUSTICE GINSBURG: How much time do you have to
22 remove? Would it be in advance of your answer?

23 MR. WALTON: Yes, Your Honor, it would.

24 JUSTICE GINSBURG: So that in my case, you would
25 remove on the basis of the complaint before you put in

1 your answer, and I think you're --

2 MR. WALTON: Yes.

3 JUSTICE GINSBURG: And then you could get into
4 the Federal court, and the answer could be laches and
5 you're in the Federal court and the only question that's
6 decided is the State law question.

7 MR. WALTON: Yes, Your Honor.

8 JUSTICE SCALIA: I suppose that happens pretty
9 often in removal -- in -- in removed cases. You really
10 don't know what the defense is going to be. If it's
11 removed on the basis of the well-pleaded complaint, when
12 the defense gets there, it -- it may often be a State -- a
13 State defense. Right?

14 MR. WALTON: That's accurate, Your Honor.
15 Excuse me.

16 If there are no additional questions, thank you.

17 CHIEF JUSTICE REHNQUIST: Very well, Mr. Walton.
18 Mr. Gornstein, we'll hear from you.

19 ORAL ARGUMENT OF IRVING L. GORNSTEIN

20 ON BEHALF OF THE UNITED STATES,

21 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

22 MR. GORNSTEIN: Mr. Chief Justice, and may it
23 please the Court:

24 An action arises under Federal law not only when
25 Federal law supplies the cause of action, but also when

1 the plaintiff's right to relief under a well-pleaded State
2 law cause of action necessarily depends on a substantial
3 question of Federal law. That second category of arising-
4 under jurisdiction is -- applies here because petitioner's
5 right to relief under its State law quiet title action
6 necessarily depends on the allegation in its well-pleaded
7 complaint that --

8 JUSTICE KENNEDY: Why wouldn't that same rule
9 apply in a State where there's a common law cause of
10 action for ejectment and it's substantively under State
11 law different from a cloud on the title? You discuss in
12 your brief, very helpfully I think, the -- the Hopkins and
13 the Taylor line of cases.

14 MR. GORNSTEIN: Right.

15 JUSTICE KENNEDY: How is your statement that you
16 just made consistent with the Court's holding under the
17 Taylor line of cases?

18 MR. GORNSTEIN: In the Taylor line of cases,
19 what is necessary to -- to allege in a well-pleaded
20 complaint for common law ejectment is only that I have
21 title and you're wrongfully here. You do not have to
22 plead the facts that show superiority of title.

23 JUSTICE KENNEDY: So if we had exactly the facts
24 of this case and there's a common law ejectment, you would
25 not say that it goes to Federal court. It would stay in

1 State court.

2 MR. GORNSTEIN: No. On Taylor v. Anderson you
3 are not. But the difference, Justice Kennedy, is in that
4 kind of case, the plaintiff wouldn't be eliminating the
5 cloud on his title. He would just be getting possession
6 of the property. So there's always going to be an
7 incentive for the plaintiff who's faced with a document, a
8 deed, that --

9 JUSTICE KENNEDY: Well, I -- I suppose that --

10 MR. GORNSTEIN: -- to -- to sue for cloud on
11 title.

12 JUSTICE KENNEDY: -- in a common law ejectment
13 action that we are supposing that what's going to come up
14 is the tax sale.

15 MR. GORNSTEIN: That's true.

16 JUSTICE KENNEDY: Which is just the facts of
17 this case. And I suppose that if the plaintiff prevails
18 on the common law cause of action for ejectment, he's got
19 a -- a res judicata defense if the -- if the present
20 occupier then makes another suit based on the tax deed.

21 MR. GORNSTEIN: In the common law cause of
22 action, which isn't available in Michigan, but under the
23 common law cause of action, all was -- all that was
24 determined was that you had a right to possession at the
25 time the lawsuit was filed.

1 JUSTICE SCALIA: I guess this -- this problem is
2 simply a consequence of the well-pleaded complaint rule.

3 MR. GORNSTEIN: It -- it is, Justice Scalia.

4 JUSTICE SCALIA: If we -- we altered that rule,
5 it would make more sense.

6 MR. GORNSTEIN: Well, the -- the --

7 JUSTICE SCALIA: This -- this kind of
8 peculiarity happens all the time.

9 MR. GORNSTEIN: It does.

10 JUSTICE SCALIA: It depends on whether the
11 Federal question has to be pleaded or not.

12 MR. GORNSTEIN: That's correct. And the
13 justification for the well-pleaded complaint rule that the
14 Court has authored is that it provides a quick rule of
15 thumb for determining at the outset of the litigation
16 which cases are most likely to be ones where the Federal
17 law issues are at the forefront.

18 JUSTICE SCALIA: It's quick and dirty. We
19 haven't tried to slice the baloney too thin in this area,
20 have we? We -- we --

21 (Laughter.)

22 JUSTICE STEVENS: Mr. --

23 JUSTICE SCALIA: It's enough to be pretty close.

24 JUSTICE STEVENS: But the way you stated the
25 rule, if I heard you correctly, you're contending that

1 Merrell Dow was incorrectly decided.

2 MR. GORNSTEIN: No, because Merrell Dow did not
3 involve a substantial question of Federal law, and that
4 was part of the test that I announced.

5 And the difference between this case and Merrell
6 Dow is twofold. First, this case falls within the Hopkins
7 line of cases, and second, this -- the role of Federal law
8 in Merrell Dow is completely different than it was in this
9 case and in the Hopkins line of cases. What was going on
10 in Merrell Dow is that the State adopted a Federal
11 standard as presumptive evidence of State law negligence,
12 and when a State adopts a Federal standard into its own
13 State law standard, the -- the action remains one that is
14 fundamentally State law in character. So the Federal
15 question in the case is not regarded as substantial.

16 But here, the situation is entirely different.

17 CHIEF JUSTICE REHNQUIST: We do occasionally
18 review that kind of a decision here.

19 MR. GORNSTEIN: You do, Mr. Chief Justice. And
20 the Court in Merrell Dow drew a distinction between what
21 is substantial enough of a Federal question to trigger
22 arising-under jurisdiction as an original matter and what
23 is substantial enough of a Federal question to obtain this
24 Court's review. And we're dealing here just with the kind
25 of substantiality that's necessary for original

1 jurisdiction under 1331.

2 JUSTICE SCALIA: I assume that a fact in a
3 particular case which affects nobody else in the country,
4 but which is determinative of the Federal question is
5 never a substantial question of Federal law. Is it? So
6 you -- you would not agree that -- that it's not only the
7 -- the content, but also the application of Federal law
8 that's --

9 MR. GORNSTEIN: Let me draw a distinction
10 between those cases where the cause of action is supplied
11 by Federal law, in which case factual issues are resolved
12 by Federal courts as long as there's a Federal cause of
13 action and cases where there's not a Federal cause of
14 action. Then you need -- the right to relief has to
15 depend on a substantial question of Federal law. So if
16 the only issue in the case, in that kind of case, is a
17 factual dispute and everybody agrees on the law, then
18 there's no substantial Federal question, no removal
19 jurisdiction. But if the right to relief depends on
20 Federal law and the meaning of Federal law and there's
21 also a factual issue in the case, that would be removable.

22 CHIEF JUSTICE REHNQUIST: If there were only a
23 dispute about when the notice was given and not a factual
24 dispute, then it would not have been removable I take it.

25 MR. GORNSTEIN: It's -- it's removable if the

1 Gornstein.

2 Mr. Zagrans, you have 4 minutes remaining.

3 REBUTTAL ARGUMENT OF ERIC H. ZAGRANS

4 ON BEHALF OF THE PETITIONER

5 MR. ZAGRANS: Thank you, Your Honor.

6 We agree with General Gornstein's statement of
7 the test. The test is a State cause of action that
8 necessarily depends on a substantial question of Federal
9 law arises under for 1331 purposes.

10 The difference between my argument and the
11 argument of respondent is the meaning of substantial or
12 what constitutes substantiality. And in Merrell Dow, the
13 Court held for all Federal statutory purposes the Federal
14 law is not substantial enough to confer arising-under
15 jurisdiction unless Congress created a private remedy
16 along with the statute. That's where we part company.

17 JUSTICE GINSBURG: Mr. Zagrans, there is
18 language in Merrell Dow that makes it sound like it's not
19 as clear and certain as you are urging. I think that the
20 opinion author said that 1331's domain is shaped by the
21 demands of reason and coherence, dictates of sound
22 judicial policy, and common sense. And if you just take
23 that last question when the only question is, is mail
24 notice good enough to satisfy the Federal statute, or do
25 you have to have in-hand service? Doesn't common sense

1 say what that section means should be a Federal question,
2 appropriate for a Federal court to decide?

3 MR. ZAGRANS: I agree, Justice Ginsburg, is --
4 it is a Federal question as a common sense matter and
5 every other way. It does not follow that it should be
6 decided and adjudicated by a Federal court. State courts
7 can and do --

8 JUSTICE GINSBURG: I'm simply making the point
9 that you are reading Merrill Lynch -- Merrell Dow in a
10 rather rigid way. And yet, there is this language in it
11 that says in -- in -- what was before the court in Merrell
12 Dow made perfectly good sense in that tort action to have
13 it going on in State court. This is quite a different
14 picture.

15 MR. ZAGRANS: I think, Your Honor, that Merrell
16 Dow's emphasis on making pragmatic, sensitive judgments,
17 judgments that are both principled and common sense,
18 dictated the holding in that case which was when it's an
19 act of Congress that is being inserted as an element of a
20 State law claim, in order then to bootstrap that State law
21 claim into Federal court on removal jurisdiction, there
22 would need to be a substantial Federal question. Who
23 decides that? Congress decides that, both as a matter of
24 judicial power and as a matter of common sense
25 application.

1 And that's the distinction, by the way, with the
2 Hopkins line of cases. I don't believe that the Hopkins
3 line is any different from the Smith v. Kansas City Title
4 & Trust line in terms of this emphasis on necessarily
5 depending on a substantial question of Federal law. The
6 difference in Hopkins is that those were competing Federal
7 land claims. The only thing in the case was Federal law.
8 Both sides took their entitlement to the property from
9 Federal mining law, and the Federal issues in that case
10 either were exclusive of all the legal issues or so
11 overwhelmingly predominated over the State law issues,
12 that that was the result in those cases.

13 JUSTICE GINSBURG: I thought that there was no
14 State law issue in this case, that the whole thing turned
15 on what kind of notion -- notice was sufficient to convey
16 title.

17 MR. ZAGRANS: There are many State law issues in
18 this case, Your Honor, in terms of the State quiet title
19 action. The only disputed issue and the issue that the
20 respondent says the State law claim necessarily depends
21 for its resolution is this disputed issue of Federal law
22 over the notice.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
24 Zagrans.

25 MR. ZAGRANS: Thank you.

1 CHIEF JUSTICE REHNQUIST: The case is submitted.
2 (Whereupon, at 10:48 a.m., the case in the
3 above-entitled matter was submitted.)
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25